

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rule
Amendments Governing Animal Feedlots,
Permits and Certifications, and Permit
Fees, Minnesota Rules, Chapter 7020,
7001 and 7002

**REPORT OF THE CHIEF
ADMINISTRATIVE LAW JUDGE**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3, and Minn. R. 1400.2240, subp. 4. These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.¹

The Administrative Law Judge approved a number of proposed changes to the Agency's rules. Those approvals are not before the Chief Administrative Law Judge for review. This review is limited to those items disapproved by the Administrative Law Judge and the reasons set forth for their disapproval.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby APPROVES all rule disapprovals contained in the Report of the Chief Administrative Law Judge dated November 18, 2013, as follows:

Rule 7020.0405, subp. 1A	[Joinder of NPDES and SDS Permits];
Rule 7020.0405, subp. 1B	[SDS Permit Based Upon Capacity];
Rule 7020.0405, subp. 5	[Joinder of NPDES and SDS Permits];
Rule 7020.0505, subp. 2A	[Joinder of NPDES and SDS Permits];
Rule 7020.0505, subp. 5	[Joinder of NPDES and SDS Permits];
Rule 7020.0300, subp. 14a	[Definition of Modification];
Rule 7020.0300, subp. 17	[Definition of Owner];
Rule 7020.0300, subp. 18B	[Definition of Pasture];
Rule 7020.0300, subp. 27	[Waters of the United States];
Rule 7020.2003, subp. 1	[Prohibited Discharges and Conduits to Groundwater];
Rule 7020.2003, subp. 2	[Prohibited Discharges and Joinder of NPDES and SDS Permits]; and
Rule 7020.2100, subp. 1D	[Liquid Manure Storage Areas].

The changes or actions necessary for approval of the disapproved rules are identified in the ALJ Report.

¹ In the Report of the Administrative Law Judge dated November 18, 2013 (ALJ Report), Administrative Law Judge Ann O'Reilly concluded that some of the rules proposed by the Minnesota Pollution Control Agency (MPCA or Agency) did not meet the requirements of Minn. Stat. §§ 14.131 to 14.18.

The Chief Administrative Law Judge respectfully disagrees with the Administrative Law Judge with regard to the sufficiency of the analysis presented with regard to the following issues raised in the proceedings. Accordingly, the following changes have been incorporated into an Amended Report of the Administrative Law Judge (Amended Report) dated December 2, 2013.

Joint NPDES/SDS Permit

The record does not support the Administrative Law Judge's original determination that "the Agency is attempting to impose a 'duty to apply' for an SDS permit on all CAFOs even if such CAFOs are not required by federal law to apply for an NPDES permit."² Therefore, Finding Nos. 154 through 160 and 264 through 266 in the ALJ Report are replaced, in their entirety, with the following findings in the Amended Report:³

154. While the MPCA has the authority to impose a "duty to apply" for an SDS permit on all CAFOs, Subpart 1A does not impose such duty. Instead, the proposed rule simply says that all CAFOs must apply for a combined NPDES/SDS permit, "as required by federal law." There is no federal law requirement for a CAFO to apply for an SDS permit, as a SDS permit is a creation of state rule, not federal law. At the same time, Subpart 1B imposes a "duty to apply" for an SDS permit on all feedlots with 1,000 or more animal units, but it does not impose such duty on all CAFOs. (Not all CAFOs necessarily have 1,000 or more animal units.)

155. Because MPCA's authority to impose a "duty to apply" is different for NPDES permits and SDS permits, it is recommended that the Agency delete all references to a joint NPDES/SDS permit in the proposed rules to prevent confusion and to maintain compliance with Minnesota Rules part 7001.1010.

156. As a result of the ambiguity of proposed Rule 7020.0405, subps. 1A and 1B, and the conflict presented with Rule 7001.1010, the proposed change to Minn. R. 7020.0405, subp. 1A, is **DISAPPROVED**.

157. In addition, because of the ambiguity created by Subpart 1A's reference to a joint "NPDES/SDS" permit, all other rules which reference the joint "NPDES/SDS" permit are also **DISAPPROVED**. These rules are as follows: proposed **Rule 7020.0405, subp. 5**; proposed **Rule 7020.0505, subp. 2A**; proposed **Rule 7020.0505, subp. 5**; and proposed **Rule 7020.2003, subp. 2**, and any other proposed rules that reference the "NPDES/SDS" permit.

158. If the MPCA amends proposed **Rule 7020.0405, Subpart 1A**, proposed **Rule 7020.0405, subp. 5**; proposed **Rule 7020.0505, subp. 2A**; proposed **Rule 7020.0505, subp. 5**; and proposed **Rule 7020.2003, subp. 2**,

² Report of the Administrative Law Judge, p. 44 at Finding 154.

³ Amended Report Finding Nos. 154 through 158, p. 44.

and any other proposed rules that reference the "NPDES/SDS" permit, such that the proposed rules reference only an NPDES permit, such change will not be substantially different from the rule proposed and would be approved.

Definition of "Owner"

The Chief Administrative Law Judge further concludes that the ALJ Report does not sufficiently describe the relevant position of the Land Stewardship Project with respect to the proposed rule's definition of "owner" as such term relates to operational control. Accordingly, the following language has been substituted for the ALJ Report's Finding No. 190.⁴

188. In a written comment, the Land Stewardship Project expressed its support of the proposed modification to the definition of "owner" and stated that it will cover situations where there is an agreement to transfer ownership of a facility to another entity.⁵ The Land Stewardship Project asserts that expanding the definition of "owner" to include those "proposing to have" possession will cover those entities that have entered into transfer agreements with the original owner and make them subject to the rule requirements.⁶ The group urged MPCA to strengthen the definition of "owner" to include all entities and persons that have control over the management of a CAFO operation. The group insists that transparency is necessary to ensure that the entity or person who applies for a permit is the same entity that is actually operating the facility. In addition, the Land Stewardship Project urged the MPCA to amend the proposed rule to prohibit the transfer of permits to owners not disclosed on permit applications.

Definition of "New Technology"

The ALJ Report is incomplete and, in minor part, in error with regard to the proposed rules' identification of "new technology." As such, the language of the original Finding No. 242 has been amended as follows and a new Finding inserted immediately thereafter, all as set forth at pages 61 to 62 of the Amended Report.

240. The Industry Groups further argue that the long timeframe imposes significant risk on farmers.⁷ Under the proposed rules, NPDES permit applications will be required to be filed six months prior to any construction, expansion or major modification.⁸ In addition, an SDS permit application will need to be filed six months prior to the implementation of a "new technology."⁹

⁴ Amended Report Finding No. 188, p. 50.

⁵ Ex. 13I.

⁶ *Id.*

⁷ Ex. 13G at pp. 2-3.

⁸ Proposed Rule 7020.0505, subp. 2A(1). See Ex. 3 at pp. 38-39.

⁹ Proposed Rule 7020.0505, subp. 2B(2). See Ex. 3 at pp. 38-39.

241. The Industry Groups also assert that the proposed rule “brings into question what constitutes ‘new technology’” and who makes the decision as to what constitutes “new technology.”¹⁰ However, existing Rule 7020.0300, subp. 15a, defines “new technology” as:

‘New technology’ means an alternative construction or operating method to those provided in parts 7020.2000 to 7020.2225. New technology construction or operating methods must achieve equivalent environmental results to the requirements in parts 7020.2000 to 7020.2225.

Therefore, when read with the definition of “new technology,” the proposed rule is sufficiently clear. The MPCA would determine what constitutes “new technology” under this definition.

Future Law Changes

The ALJ Report does not sufficiently address the issue of future law changes on the regulatory force and effect of the proposed rules. Accordingly, the following language has been incorporated into the Amended Report.¹¹

Part 7020.0505, subpart 5 – Application Process

258. Proposed Rule 7020.0505, subpart 5B provides that the term of an SDS permit is 10 years. The Environmental Groups urged the MPCA to amend the proposed rule to require that SDS permits incorporate future law changes that occur during the 10-year permit period.¹²

259. The MPCA did not propose a change based upon the Environmental Group’s policy request. While the Environmental Groups’ comment is a reasonable one, it was not adopted by the Agency and is, thus, outside the scope of this rules review. Proposed Rule 7020.0505, subp. 5 is reasonable and necessary. Accordingly, proposed Rule 7020.0505, subpart 5 is **APPROVED**.

15-Day Review Period

The ALJ Report does not adequately address concerns raised by various interested parties regarding the 15-day period for reviewing permits issued by delegated counties. Therefore, the Amended Report includes the following new section:¹³

¹⁰ See Ex. 13G at p. 3.

¹¹ Amended Report Findings 258 to 259, p. 65.

¹² Exs. 13J and 20

¹³ See Amended Report Findings 260 to 262, pp. 65-66.

Part 7020.1600, subpart 4a, Item E – Issuance of Permit by Delegated Counties

260. Proposed Rule 7020.1600, subpart 4a, Item E provides that the Commission shall have 15 days to review, suspend, modify, or reverse the issuance of a permit by a delegated county. The Environmental Groups assert that 15 days is an insufficient amount of time for the MPCA to thoroughly review a permit issued by a delegated county and that the time for review should be longer.

261. Minnesota Statute section 116.07, subdivision 7 specifically provides


The Pollution Control Agency shall, after written notification, have 15 days to review, suspend, modify, or reverse the issuance of the permit. After this period, the action of the county board is final, subject to appeal as provided in chapter 14.

262. Because Minnesota Statutes specifically provides for the 15-day review timeframe, the Agency is without authority to change the time for review. Accordingly, proposed Rule 7020.1600, subpart 4a, Item E is reasonable and necessary, and is hereby **APPROVED**.

In order to correct the defects enumerated by the Administrative Law Judge and detailed in the attached Amended Report, the agency shall make changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4.

If the agency chooses to make changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: December 2, 2013



TAMMY L. PUST
Chief Administrative Law Judge